

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

FRANK LA PENA,

Plaintiff(s),

v.

LVMPD, et al.,

Defendant(s).

Case No.2:21-CV-2170 JCM (NJK)

AMENDED ORDER

Presently before the court is plaintiff Frank LaPena's motion for reconsideration. (ECF No. 153). Defendants Melvyn Harmon and the Estate of Melvyn Harmon ("Harmon") filed a response (ECF No. 156), to which plaintiff replied (ECF No. 157). For the reasons stated below, the court denies the motion.

I. Background

This action arises from LaPena's wrongful conviction in a murder case several decades ago. As the court has already thoroughly recounted LaPena's allegations in prior orders, it provides only a short summary here.

In 1974, Las Vegas resident Hilda Krause was murdered in her home by two masked assailants. (ECF No. 24). One assailant was identified as Gerald Weakland by a confidential LVMPD informant. (*Id.*). Weakland was arrested and agreed to cooperate with the investigation in exchange for leniency. (*Id.*). Weakland admitted to his role in the murder and eventually named LaPena as a co-defendant. (*Id.*). Based on Weakland's confession, LaPena was wrongfully convicted and sentenced for Krause's murder in 1977. (*Id.*).

LaPena was granted a general pardon in 2019 and issued a Certificate of Innocence in 2021. (*Id.*). LaPena filed a complaint in 2021 alleging that he was maliciously framed and convicted for

1 murder. (*Id.*). LaPená alleged over a dozen causes of action against numerous defendants in his
 2 amended complaint. (ECF No. 24). The court has since dismissed all claims against all
 3 defendants. (ECF Nos. 152, 159). LaPená now moves the court to reconsider its dismissal of his
 4 claims against prosecutor Melvyn Harmon.

5 LaPená specifically alleged Harmon, as prosecuting attorney, concealed exculpatory
 6 evidence, “coerced” Weakland’s statements, and conspired to wrongfully prosecute him for
 7 Krause’s murder. The court granted Harmon’s motion to dismiss in full, finding Harmon is entitled
 8 to prosecutorial immunity on nearly all claims.

9 **II. Legal Standard**

10 Rule 59(e) “permits a district court to reconsider and amend a previous order[;]” however,
 11 “the rule offers an extraordinary remedy, to be used sparingly in the interests of finality and
 12 conservation of judicial resources.” *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003)
 13 (internal quotations omitted). A motion for reconsideration “should not be granted, absent highly
 14 unusual circumstances.” *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000).

15 On one hand, a motion for reconsideration “may not be used to raise arguments or present
 16 evidence for the first time when they could reasonably have been raised earlier in the litigation.”
 17 *Kona Enters., Inc.*, 229 F.3d at 890. On the other hand, “[a] movant must not repeat arguments
 18 already presented unless (and only to the extent) necessary to explain controlling, intervening law
 19 or to argue new facts. A movant who repeats arguments will be subject to appropriate sanctions.”
 20 LR 59-1(b).

21 Thus, the Ninth Circuit has provided that “[r]econsideration is appropriate if the district
 22 court (1) is presented with newly discovered evidence, (2) committed clear error or the initial
 23 decision was manifestly unjust, or (3) if there is an intervening change in controlling law.” *School*
 24 *Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993); Fed. R. Civ. P. 60(b).

25 **III. Discussion**

26 LaPená alleged four § 1983 claims and six state law claims against Harmon. The court
 27 dismissed all but one claim on absolute prosecutorial immunity grounds. LaPená moves the court
 28 to reconsider its dismissal on two grounds: (1) the court erred finding Harmon is entitled to

1 prosecutorial immunity for eliciting and relying on false testimony, and (2) there is newly
2 discovered evidence concerning a confidential informant.

3 A. The court did not commit clear error in dismissing LaPena's claims.

4 First, LaPena argues the court overlooked his allegations that Harmon engaged in the
5 fabrication of false evidence and subornation of Weakland's perjured testimony, which LaPena
6 argues are outside of prosecutorial immunity. (ECF No. 153). The court reviews its decision for
7 clear error or manifest injustice. *See School Dist. No. 1J*, 5 F.3d at 1263.

8 Prosecutors are entitled to absolute immunity from liability under section 1983 for actions
9 performed within their prosecutorial function. *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 912 (9th
10 Cir. 2012) ("Immunity attaches to the nature of the function performed, not the identity of the actor
11 who performed it." (citations omitted)). Nevada law similarly applies absolute immunity to most
12 state tort claims arising out of prosecutorial function. *See Dorsey v. City of Reno*, 238 P.3d 807
13 (Nev. 2008).

14 Between January and March 1974, Harmon interviewed Weakland several times about the
15 Krause murder. Weakland did not name LaPena as a co-conspirator to the murder until he was
16 offered immunity on other charges. Weakland's testimony implicating LaPena was ultimately
17 proven false. LaPena realleges the same general facts from his complaint—Harmon knowingly
18 elicited and relied on Weakland's false testimony to wrongfully convict LaPena.

19 LaPena's argument fails to show that reconsideration is appropriate. The allegations in
20 LaPena's motion are conclusory, informed only by circumstantial and speculative information.
21 Weakland's testimony concerning LaPena was indeed proven false, but this does not meet the
22 standard to escape prosecutorial immunity, much less to show clear error or manifest injustice.
23 *See Imbler v. Pachtman*, 424 U.S.409, 431 (1976).

24 Actions that the Supreme Court has held to be within the prosecutorial function—and thus
25 covered by absolute immunity—include initiating a prosecution, presenting the government's
26 case, using false testimony at trial, suppressing exculpatory evidence, and even malicious
27 prosecution. *Milstein v. Cooley*, 257 F.3d 1004 (9th Cir. 2001) (citing *Imbler*). The Supreme
28 Court even recognizes presenting evidence in support of a search warrant as prosecutorial, not

1 investigative. *Burns v. Reed*, 500 U.S. 478, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991).

2 Given the Supreme Court’s broad characterization of prosecutorial conduct, the court is
3 sufficiently persuaded that the early interactions between Harmon and Weakland were within
4 Harmon’s role as a prosecutor. *See Buckley v. Fitzsimmons*, 509 U.S. 259 (1993) (reemphasizing
5 broad prosecutorial immunity). LaPena fails to illustrate with controlling law how such a finding
6 presents any clear error or manifest injustice beyond repeating conclusory allegations.
7 Accordingly, the court declines to reconsider its dismissal order on these grounds.

8 B. LaPena fails to present newly discovered evidence.

9 LaPena also moves the court to reconsider his claims in light of newly discovered evidence
10 that Harmon suppressed LaPena’s access to a confidential informant. Joseph Costanza was the
11 informant who revealed Weakland’s name to LVMPD after the Krause murder. Costanza told
12 LVMPD that Weakland approached him with the idea to murder Krause. LaPena alleges that
13 Harmon intentionally concealed Costanza’s identity over several decades to obstruct LaPena’s
14 defense. LaPena states, “the entire project was designed by Harmon to make sure Costanza was
15 never interviewed by the defense and never made it back to Las Vegas to provide testimony.”
16 (ECF No. 153 at 22).

17 LaPena offers an undated affidavit to support his theory. The affidavit describes a 1983
18 conversation between an LVMPD detective and Weakland, which states Costanza instead
19 approached Weakland to commit the murder—not the other way around. LaPena argues that the
20 affidavit alone shows Harmon was aware LaPena was innocent as early as 1983 and nonetheless
21 continued to prosecute him.

22 LaPena’s arguments are unavailing on a motion for reconsideration. The speculative “new
23 evidence” LaPena suggests is embedded in hearsay and contradiction in the record. LaPena
24 suggests Costanza’s identity was suppressed through 1985, but Harmon’s counsel correctly
25 points out that Costanza was openly identified in conversations as early as 1974. (ECF No. 156 at
26 16).

27 In order to form a basis for relief from judgment, newly discovered evidence must be likely
28 to produce a different outcome. *McKinnon v. OneWest Bank, FSB*, No. 2:12-cv-329, 2012 U.S.

1 Dist. LEXIS 126462, at *3 (D. Nev. Sep. 5, 2012). LaPena fails to show how the newly discovered
2 affidavit would change the court's decision. Even with more plausible and corroborated evidence,
3 the suppression of material evidence at trial is protected by absolute immunity. *Imber*, 424 U.S.
4 at 409.

5 C. Leave to amend would be futile.

6 LaPena seeks, in the alternative, leave to amend his complaint. "[A] district court may
7 dismiss without leave where a plaintiff's proposed amendments would fail to cure the pleading
8 deficiencies and amendment would be futile. *Cervantes v. Countrywide Home Loans, Inc.*, 656
9 F.3d 1034, 1041 (9th Cir. 2011).

10 Here, the court found Harmon is entitled to absolute prosecutorial immunity but
11 nonetheless noted the pleading deficiencies in LaPena's complaint. The gravamen of LaPena's
12 allegations involve Harmon's role as a prosecutor and thus fall squarely in line with prosecutorial
13 immunity. Moreover, the allegations are rooted in hearsay by defendants who have since passed.
14 The court finds that amendment could not remedy the deficiencies in LaPena's evidence and is
15 thus inappropriate.

16 **IV. Conclusion**

17 Accordingly,

18 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that plaintiff's motion for
19 reconsideration (ECF No. 153) be, and the same hereby is, DENIED.

20 DATED November 14, 2024.

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23 UNITED STATES DISTRICT JUDGE
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